IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 590.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, and THE COMMONWEALTH & SOUTHERN CORPORATION.

No. 591.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *Petitioner*,

v.

FEDERAL POWER COMMISSION and SOUTH CAROLINA ELECTRIC & GAS COMPANY.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITIONER'S REPLY BRIEF.

In reply to the opposition briefs of the Government and of the intervening respondents, Petitioner respectfully calls the attention of the Court to the following matters:

1. The Construction of the Creech Case by the Court Below.

The Government states (Government Brief, p. 12) that "Neither the SEC nor the Court below purported to decide the State law;" This contention is also made by Commonwealth (Commonwealth Brief, pp. 10 and 11). These

Respondents argue that the Court below merely sustained the position of the SEC that the effect of the *Creech* case was to cast substantial doubt upon the Authority's right to purchase in the circumstances of the instant case. The Court below did sustain the SEC's position but the point is that the Court below did so *because of an erroneous decision of State law,* namely, that by the *Creech* decision "the question of the right of the Authority to acquire the property of another power company has been squarely decided against it." (R-SEC 315; R-FPC 329; Petitioner's Brief, p. 40) This was beyond question a decision of State law. It was also clearly wrong.

2. The Action of the Two Commissions.

In the face of the express admission of both Commissions that they excluded from consideration the most important relevant evidence before them bearing upon the public interest, the Government and Commonwealth contend that in fact they weighed this evidence fully. (Government Brief, pp. 15-18; Commonwealth Brief, pp. 13-16.) It is clear, however, from the Government's own review of the action of the two Commissions (Government Brief, pp. 13-18) that they did not consider this evidence and felt justified in refusing to consider it because they regarded the Authority's offer as not being an available alternative—the SEC because of its unwarranted assumption that the Authority was disqualified by the *Creech* decision, the FPC because it considered the Authority disqualified by the action of the SEC. Both Commissions, moreover, so construed their statutes that neither was left with responsibility to protect the public and consumers. The error of the two Commissions was not in how they weighed the evidence which they considered, but in failing to consider the most important relevant evidence before them. (Petitioner's Brief, pp. 28-37.) If either Commission had considered the facts bearing on the public interest, it would certainly have reached the opposite conclusion.

3. The Functions of the Commissions and of Management.

Both the Government and Commonwealth say that in effect the Authority would have the two Commissions substitute their judgment for the judgment of Commonwealth's management. (Government Brief, pp. 14, 15; Commonwealth Brief, p. 15.) This is not the case. The Authority does believe that when, as here, the management has proposed a transaction which is not in the public interest and which will be injurious to consumers, the Federal Commissions are required by their Acts to disapprove it. The record shows that there are a number of available alternatives to sale to Electric & Gas, e.g., sale to the Authority or distribution of the Power Company's stock to Commonwealth's stockholders or sale to a third purchaser, any one of which would be far more in the public interest than sale to Electric & Gas. If this sale is ultimately disapproved the management can propose any one of these alternatives and it should properly be approved if the Commissions find it to be in the public interest.

4. The Action of South Carolina Commission.

Both the Government and the Commonwealth briefs make much of the fact that the South Carolina Public Service Commission approved the issuance by Electric & Gas of the securities necessary to finance the acquisition and purported to approve the entire transaction. (Government Brief, p. 16; Commonwealth Brief, p. 14.) To this it may be said, first, that the action of the South Carolina Public Service Commission did not relieve either Federal Commission of its plain duty to consider and weigh independently all of the relevant evidence before it. In the second place, a perusal of the proceedings before the South Carolina Commission leaves no doubt that that Commission was affected by extreme bias and was understandably loath to lose its jurisdiction over the Power Company, which it would have lost upon acquisition by the Authority. Third,

the South Carolina Commission did not in fact consider the alternative of sale to the Authority. (See TR-SCPSC Vol. 5 pp. 101-106 and Order of South Carolina Public Service Commission of December 23, 1947, set out at R-SEC 98-101 and R-FPC 102-105.) Finally, while the Federal Commissions might have given weight to the State Commission's action it is obvious from their opinions that neither thought it was worthy of much consideration.

5. The Public Ownership Issue.

Commonwealth has sought without warrant to interject in these proceedings the issue of public versus private ownership. (Commonwealth Brief, pp. 14, 15.) The Authority does not and has not at any time asked any special consideration for its position on the grounds that it is a public body or that acquisition by it of the Power Company would bring the latter into public ownership. It has contended throughout that both Federal Commissions should have disapproved the sale to Electric & Gas solely on the grounds that in the particular circumstances of this particular situation, in the light of such objective considerations as power supply, financial condition, etc., the public interest would be injured by sale to Electric & Gas and would be infinitely better served by acquisition by the Authority. It is true that the Authority does conceive its obligation to the public with respect to the publicly financed power which it produces as requiring it to take every means at its disposal to see that this power comes to the consumers as cheaply as possible. But it has never insisted that this result be achieved through public ownership if it could be assured in any other way. As proof of its willingness to accept another way it offered in the proceedings before the South Carolina Commission to withdraw its opposition entirely if Electric & Gas would promise, as the Authority has promised, an immediate 10% rate reduction to the Power Company's consumers. (R-SEC 76, 77; R-FPC 61, 62.) Electric

& Gas refused this offer. As a consequence of its refusal, the Authority has had no alternative but to press its claims as the party making by far the most advantageous offer for the property from the point of view of all interested groups —consumers, investors and the public.

6. Why Competitive Bidding Should Have Been Ordered.

The Government (Government Brief, p. 14) argues that there would have been no different result if competitive bidding had been required under the SEC's Rule U-50. The reason why competitive bidding should have been ordered is that, as the record shows, (R-SEC 38, 39; R-FPC 23, 24; TR-SEC 169, 170) an order for competitive bidding was the only way, after Commonwealth had refused to make an agreement with the Authority, whereby under South Carolina law a case of genuine controversy could have been stated wherein the right of the Authority to purchase would be conclusively settled. (Petition, p. 11.) By refusing to order competitive bidding the SEC denied the Authority the right to establish its qualifications beyond question. In view of all that was at stake for the interested public and consumers, the SEC's refusal amounted to an abuse of discretion.

WHEREFORE, it is respectfully submitted that the petition for writs of certiorari should be granted.

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